

NOT TO BE PUBLISHED

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)**

THE PEOPLE,		C057593
Plaintiff and Respondent,		(Super. Ct. No. P06CRF0323)
v.		ORDER MODIFYING OPINION AND DENYING REHEARING
ANDRE ZELINSKI LUCAS,		[NO CHANGE IN JUDGMENT]
Defendant and Appellant.		

THE COURT:

It is ordered that the nonpublished opinion filed herein on July 15, 2009, be modified as follows:

1. On page 28, after the citations at the end of part V. of the Discussion, which read: "(*People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)", insert the following new part VI.:

VI. Sentencing Error for Attempted Rape

The trial court selected "the midterm of seven years" on count I, the attempted forcible rape count, and then doubled it under the three strikes law to arrive at a sentence of 14 years. Defendant points out,

and the Attorney General agrees, that the trial court erred. The statutory midterm for rape is six years. (§ 264, subd. (a).) The proper midterm for attempted rape was therefore three years. (§ 664, subd. (a).) Since defendant will have to be resentenced in any event, we merely note the error and trust that it will not be repeated.

2. On page 28, renumber part VI. of the Discussion, so that it now reads: **"VII. Truth of the Strike Prior"**.

With the above modifications, the petition for rehearing is denied.

These modifications do not constitute a change in the judgment.

BY THE COURT:

NICHOLSON, Acting P. J.

HULL, J.

BUTZ, J.